No. 12341

In the United States Court of Appeals for the Ninth Circuit

JACOB CORNET, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLEE'S BRIEF

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COUNTERSTATEMENT OF THE CASE

This is an appeal by the defendant in the Court below from a judgment of restitution for overcharges of rent, contrary to Section 206 (a) of the Housing and Rent Act of 1947 (50 U. S. C. A. 1881, et seq.),[1] hereinafter referred to as the "Act", and the Regulations issued pursuant thereto (12 F. R. 4331). Jurisdiction of the Court below was invoked pursuant to Section 206 (b) of said Act.

On November 16, 1948 the Housing Expediter filed suit against the defendant as landlord of premises located at 1925–1953 Jackson Street, San Francisco, California (R. 1). The housing accommodations in

[1] Sections 206 (a) and (b) of the Act are set forth in full (*infra*, p. 32).

question were located within the San Francisco Bay Defense-Rental Area and were subject to the Act and the regulations issued pursuant thereto. The defendant-landlord was sued for an injunction restraining him from violating said Act and regulations and for an order of restitution returning rents unlawfully collected (R. 3–4).[2] The defendant denied generally the collection of rents in excess of the legally established maximum (R. 7), and as an affirmative defense pleaded compliance with Section 204 (b) of the said Act,[3] stating that the rents collected were the permissible 15% increase in the monetary rents allowable under said Act (R. 8).

It was the plaintiff's contention at the outset of the trial that these leases were not "valid leases" within the meaning of Section 204 (b) because they provided for a decrease of services contrary to the requirements of the Act and the regulation. Plaintiff contended that these leases did in fact provide for a decrease in services inasmuch as they contained a shifting of the landlord's obligation to maintain the premises to the tenant (Tr. 2). The crux of the matter turned upon whether or not the handwritten guarantee initialed "JC," after Clause 19, was a part of the leases prior to their rejection by the Housing Expediter (Plaintiff's Exhibit No. 1). This guarantee reads: "Lessor agrees to maintain same services as before signing of this lease." The defendant main-

[2] At the time of trial defendant no longer owned or operated the property so the prayer for injunction was abandoned (Conclusion 4, R. 15).

[3] Section 204 (b) is set forth in full (*infra*, p. 31).

tained that this statement was in the leases *prior* to the signing and filing of these leases (Tr. 97). However, on cross-examination plaintiff introduced into evidence a letter dated December 10, 1948 written by defendant's attorney and addressed to Mr. Sidney Feinberg, Chief of the Litigation Section of the Office of the Housing Expediter in San Francisco (Plaintiff's Exhibit No. 5) which refuted such contention. This letter reads as follows (Tr. 108–110):

> Mr. DONOHUE. This letter is addressed to Mr. Sidney Feinberg, dated December 10, 1948:
>
> Re: *Woods* v. *Cornet,* Action # 28433–R
>
> DEAR MR. FEINBERG: For your records, we are herein setting forth the facts pertaining to the above entitled case.
>
> On July 25, 1947, our client, Mr. Jacob Cornet, filed with the San Francisco Rent Office leases providing for a 15% rental increase on all of the units mentioned in your complaint. Some months later, the said leases were returned to Mr. Cornet with a notice of rejection on the ground that the leases provided for a reduction of services. Upon receipt of the rejected leases, Mr. Cornet went to each tenant and added the following clause in both the landlord's and tenant's copy of said leases, "Lessor agrees to maintain same services as before signing of this lease."
>
> Mr. Cornet had originally obtained these form leases from the Apartment House Owners Association. After the above service clause was added to said leases, our client called the said association and talked to Mr. Christin who informed Mr. Cornet that it was not neces-

sary to refile the said leases. He told Mr. Cornet that as long as he originally filed the leases the O. P. A. had no right to return them and that Mr. Cornet had complied with the rent law by filing the same and there was nothing further that he had to do.

The original lease for 1941 Jackson was with a Mrs. Williams who moved out on or about the end of January, 1948, thereby decontrolling said unit. Mr. Cornet being advised that said unit was no longer under control rented the same to Mr. Farban at the increased rental.

Mr. Cornet sold this property in May of 1948.

On the basis of the above facts, we feel that this suit should be dismissed and no restitution required.

While you are giving this matter your consideration, please extend the time for the defendant to plead until January 15, 1948.

Very truly yours,

DAVID D. WEXLER.

The case was tried on the factual issues and decided in favor of the Expediter. In accordance with the testimony introduced, the Court below entering findings of fact as follows:

1. That the premises were subject to the Act and the regulations (R. 10).

2. That the maximum rent was as alleged in plaintiff's complaint (R. 11).

3. That the landlord collected specific amounts in excess of those established maxima which were set forth individually in said findings (R. 12).

4. That except as to one housing accommodation the excess rents collected by the defendant were collected

pursuant to a lease purported to have been executed pursuant to Section 204 (b) of the Act (R. 12).

5. Each of the leases mentioned above purported to have been executed on July 15, 1947 were received in the area rent office on July 25, 1947, and upon their examination in said office in the months of August and September 1947 were rejected by the area rent director "as not conforming with the requirements of the Act and were returned to the defendant as not acceptable" for filing, and in which the reasons for such rejection were set forth (R. 13).

6. That after said rejection and notice to the defendant he took no administrative appeal or review and failed, neglected or refused to file new, modified or corrected leases and continued to collect the rents provided in the rejected leases (R. 13).

7. That the reasons for rejection of the leases by the Area Rent Director are supported by substantial evidence (R. 14).

8. That the leases above mentioned, "were ineffective to increase the legal maximum rent for the accommodations" because "each of said leases contained provisions permitting or providing for a substantial decrease or reduction in services" (R. 14).

9. That defendant no longer owns or operates the housing accommodations in question (R. 14).

As conclusions of law the Court held:

1. That the Court had jurisdiction of the subject matter and of the parties (R. 14).

2. That defendant has both failed to pursue and exhaust prescribed administrative remedies (R. 15).

3. "That the leases * * * were not valid or

effective to increase the legal maximum rent * * *" (R. 15).

4. That plaintiff is not entitled to an injunction because defendant no longer owns or operates the premises (R. 15).

5. That on account of the violations of the Act and the regulations, an order of restitution be entered requiring the return of the excess rents to the tenants so overcharged (R. 15).

On the basis of the foregoing, the Court below entered a judgment on June 1, 1949 providing for the return of the excess rents collected to specifically named tenants in the total sum of $821.14 (R. 17). Notice of appeal was filed on July 28, 1949.

STATUTES AND REGULATIONS

The issues in this appeal turn upon the provisions of the Act and the regulations regarding:

1. The permissive increase in rent provided in Section 204 (b) of said Act where tenant and landlord enter into a voluntary written lease for a given statutory period, and

2. Whether the maximum rent as used in the Act and regulation is confined to the monetary rent involved or whether it includes the term as used in its full connotations in both the Act and regulation; that is, whether a decrease in services is an increase in rent as to invalidate a monetary increase in rent of 15% authorized by the Act.

The pertinent portions of the Act are:

Section 204 (b) (50 U. S. C. A. 1894 (b), *infra,* p. 31), which provides that the maximum rent is the

maximum rent in effect on June 30, 1947 unless the landlord and tenant (1) voluntarily enter into a written lease on or before December 31, 1947, (2) the lease takes effect after July 1, 1947 and expires on or after December 31, 1948, (3) if such lease is filed within fifteen days of execution with the Housing Expediter, (4) the rent may increase not more "than fifteen per centum over the maximum rent * * *." Such lease being validly filed with the area rent director removes said property from federal rent control.

Section 204 (d) (50 U. S. C. A. 1894 (d), *infra,* p. 32) provides that the Housing Expediter may issue such regulations as are consistent with Title II of the Act and necessary to carry out the provisions of Section 204.

Section 206 (a) (50 U. S. C. A. 1896 (a), *infra,* p. 32) provides that it shall be unlawful for any person to demand, accept, or receive any rent in excess of the maximum established under Section 204.

Section 206 (b) (50 U. S. C. A. 1896 (b), *infra,* p. 32) provides that the Expediter may apply for an injunction and "other order" in order to enforce compliance with said Section 206 (a).

Pertinent provisions of the Controlled Housing Rent Regulation (12 F. R. 4331) are set forth in full, *infra,* pp. 33–35, and are summarized as follows:

Section 1 of said regulation defines "Rent" as "the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or

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the transfer of a lease of such accommodations."

Section 2 of said regulation provides that no person shall demand, accept, or receive rent in excess of the legally established maximum and further provides that "a reduction in the minimum space, services, furniture, furnishings or equipment required under Section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent * * *."

Section 3 provides that every landlord must provide the same living space as provided on June 30, 1947, and the same essential services, furniture, furnishings, and equipment as he was required to provide on that date.

Section 4 (a) of the regulation provides that the maximum rent shall be that which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942.

Section 4 (b) of the Controlled Housing Rent Regulation (12 F. R. 4331), consistent with the provisions of Section 204 (b) of said Act provides for the carrying out of the enumerated provisions of Section 204 (b) and the addition provides that "a lease shall be effective under this paragraph to increase the maximum rent only if it provides with the housing accommodations the same living space and the same essential services, furniture, furnishings, and equipment as required by this regulation prior to the effective date of the lease * * *."

ARGUMENT

I. Contrary to defendant's first contentions the rent regulation is consistent with the act

A. A cursory examination of the Act, the regulations and the cases construing them will amply demonstrate that Section 4 (b) of the regulations is consistent with the Act. The Housing and Rent Act of 1947 provided *inter alia* that the Expediter may "by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title * * *" (Sec. 204 (b)). Pursuant to his statutory authority "to carry out the provisions of this title", the Expediter promulgated the "Controlled Housing Rent Regulation" (hereinafter referred to as the "Regulation") (12 F. R. 4331). Section 2 (a) of said Regulation provides that a reduction in essential services shall constitute an increase in rent. Section 2 (a) provides as follows:

> *Prohibition against higher than maximum rents*—(a) *General prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do

> any of the foregoing. A reduction in the minimum space, services, furniture, furnishings, or equipment required under section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received.

The Regulation further provides that the landlord shall continue to furnish minimum services. Section 3 reads:

> * * * every landlord shall, as a minimum, provide with housing accommodations, the same living space as provided June 30, 1947, or on the date he first rented on or after July 1, 1947, and the same essential services, furniture, furnishings, and equipment as those he was required to provide on June 30, 1947, in accordance with the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, or those he provided on the date he first rented on or after July 1, 1947, and as to other services, furniture, furnishings and equipment not substantially less than those he was required to provide on June 30, 1947, or actually provided on the date of first renting on or after July 1, 1947.

There can be no serious contention made that under the Housing and Rent Act of 1947 the Expediter lacks power to issue regulations and orders to achieve "a reasonable stability in the general level of rents * * *" (Sec. 201 (b)). In so issuing these regulations, he is limited only by the intent of the Act, and the means to effectuate that intent so long as they are neither unreasonable nor capricious (*Commissioner of*

Internal Revenue v. *Fiske's Estate,* 128 F. 2d 487, 490 (C. A. 7th)). As was said in that case:

> In construing a claimed exemption, we must consider the objects and purposes of the statute and give it such a construction as will carry out the true intent and meaning of Congress.

In applying these tests, we may look to the history of these provisions and the Court's interpretation and application of them.

Both Sections 2 and 3 above (pp. 9–10) were promulgated in substantially the same form (8 F. R. 7322) under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.) [4] as Sections 2 and 3 of the Regulation under the Housing and Rent Act of 1947. Section 2 was less explicit under the prior Act than under the present Act in that the sentence "a reduction in the minimum space, services,

[4] The pertinent provisions of the Regulation issued pursuant to the Emergency Price Control Act, as amended (50 U. S. C. A. 901, et seq.) provided that "no person shall demand or receive any rent for or in connection with the use or occupancy on or after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation * * *" (Sec. 2 (a)). Within the meaning of that section, "rent" was defined as "the consideration including any bonus, benefit or gratuity demanded or received for or in connection with the use or occupancy of housing accommodation * * *" (Sec. 13 (a) (10)). That definition has been adopted by the Regulation issued pursuant to the present Act (Sec. 1, 12 F. R. 4331). As a means of assuring that each tenant would not indirectly suffer from actual cost increases while paying same monetary rent, the Administrator provided "except as set forth in Section 5 (b), every landlord shall as a minimum provide with housing accommodations * * * the same essential services, furniture, furnishings and equipment as those provided on the date determining the maximum rent * * *" (Sec. 3).

furniture, furnishings, or equipment required under Section 3 of this Regulation shall constitute an acceptance of rent higher than the maximum rent," was not part of it. Even though that express *caveat* was not part of the original Regulation, the courts had no hesitancy in determining that a decrease in services was an increase in rent.

This contention has been recognized by the Emergency Court of Appeals, the enforcement courts, and by the Price Administrator in the administration of the Price Control Act (*Benenson Realty Corp.* v. *Porter,* 158 F. 2d 163 (E. C. A.); *Absar Realty Company* v. *Bowles,* 149 F. 2d 654 (E. C. A.); *Porter* v. *Darlington,* 158 F. 2d 68 (C. A. 10th); *Woods* v. *Hadesman,* 86 N. E. 2d 583 (Ill. App.)). There can be little question from these cases that the discontinuance of service, furniture, and furnishings is an increase in rent within the meaning of the Act and the Regulations issued thereunder, and likewise for all practical purposes, that the Regulation is perfectly consistent with the Act. Nor can there be any doubt but that defendant contends that a reduction in services is not an increase in rent. He states this unequivocably on page 13 of his brief:

> It is our contention that where the leases comply with all of the provisions of the Act, as in this case, that the new and increased maximum rent went into effect August 1, 1947; that the Area Rent Director had no authority to reject said leases on August 14, 1947, and September 8 or 9, 1947, and that the lower Court erred in holding that even though the leases complied with all of the provisions of the

> Act that because said leases provided for reduction of services that by virtue thereof said leases were ineffective to increase the legal maximum rental.

Under the Emergency Price Control Act of 1942, the Emergency Court of Appeals frequently upheld the validity and propriety of administrative orders reducing rentals where services were reduced (see, *Benenson Realty Corp.* v. *Porter,* 158 F. 2d 163; *Absar Realty Company* v. *Bowles,* 149 F. 2d 654). The manifest reasoning behind this rule was that reduction of services constituted an increase in rent. This was consistently the rule adhered to by the Price Administrator under the Act: "If the tenant is required to pay the same rent and receives less services, it is as much an increase in rent as the payment of a higher rent for the same services would be" (*In the Matter of Herman Landerman,* Docket No. RPA–VI–73–P, 4 OPA Op. & Dec. 3233, 3236). Again, *In the Matter of Frederick Bartenstein,* Docket No. RPA–VIII–82–P, OPA Op. & Dec. 3392, the Administrator said:

> The control of services under the regulation is exercised primarily for the purpose of assuring that the landlord does not in effect increase the maximum rent by a decrease in services. A withdrawal of services has much the same practical effect as an increase in rent.

Furthermore, the Emergency Court of Appeals held that a reduction in services justified a decrease in rent in the *Benenson* case, 158 F. 2d 163, where services were reduced, and an order decreasing the rent was entered:

> The reason for making the decrease in rentals thus effective was because the services had been discontinued while the premises were occupied, without orders having been secured permitting the decrease of services, and without a showing that it was impossible for the landlord to maintain the services (p. 164).

So, too, in vindication of the public interest, enforcement courts have not hesitated to exercise both their traditional equity powers, and also the statutory powers granted by the Emergency Price Control Act. A notable illustration is *Porter* v. *Darlington,* 158 F. 2d 68 (C. A. 10th), where the Court compelled a landlord to restore cooking gas services.

In the case of *Creedon* v. *Stratton,* 74 F. Supp. 170 (D. C. Neb.), the first case arising under the present rent Act, Judge Delehant expressly held that decrease in services was an increase in rent. In that case, as in the case at issue, the Expediter filed suit pursuant to Section 206 (b) for a mandatory injunction to restore discontinued services. The Court held that the suit was properly filed under Section 206 (b), holding that a decrease in services is an increase in rent.

> This suit was expressly bottomed on Section 206 (b) of the Housing and Rent Act of 1947. That section must be carefully read in an appraisal of the extent to which the Expediter may demand injunctive relief as his right. It is only in the face of the actual or threatened violation by a person of Section 206 (a) of the Act forbidding the offering, solicitation, demanding, acceptance or receipt of overceiling rent, that the expediter may apply to the court

> for relief. And the relief for which he may apply is narrowly defined as "an order enjoining such act or practice, or * * * an order enforcing compliance with" Section 206 (a). And the court, upon a showing of such actual or threatened overceiling charge (*including, of course, overcharges through the interception or curtailment of service*), is directed to grant without bond "a permanent or temporary injunction, restraining order, or other order" (*Creedon* v. *Stratton,* 74 F. Supp. at p. 181). [Italics added.]

See also, *Creedon* v. *O'Brien,* No. C. A. 6782 (U. S. D. C. Mass.), decided May 16, 1947, not reported, for opinion see Appendix, p. 37.

B. The background of Section 4 (b) of the regulation is equally persuasive in view of the reenactment of the Act at a time when the Expediter's interpretation was in existence which declared that to be eligible for the benefits of Section 4 (b) a landlord could not reduce services. This is to be found in the official interpretation of Section 4 (b) which was published in the Federal Register on July 23, 1947 (12 F. R. 5040). In that interpretation the Expediter provided as follows:

> VI. *Lease providing for decrease in living space, services, furniture, furnishings and equipment.*—In order for a lease to effectively increase the maximum rents otherwise allowable, it must be based upon the continuation of the same services by the landlord. Therefore, if a lease provides for a decrease in the living space or essential services, furniture, furnishings, or equipment which are required

> under the regulations to be provided with the housing accommodations, or a substantial decrease in the other services, furniture, furnishings, or equipment, such lease shall be ineffective to establish a new maximum rent.

With the regulation in existence and the official interpretation having been published,[5] the Congress not only reenacted the provision of the statute in substantially the same term but did so after a thorough examination of the effect of the original enactment and the Expediter's administration under it. In reporting the bill to the House of Representatives the Committee on Banking and Currency stated:

> In the second category there are those cases where such a 1947 lease might be terminated after the effective date of this act and prior to March 31, 1949. In these cases the Committee amendment provides that such housing accommodations remain subject to a maximum rent not to exceed 15 percent over the maximum rent which in the absence of a lease would be in effect with respect thereto on the effective date of this act.

This Court has held that such reenactment after Congressional scrutiny amounts to a legislative ratifi-

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[5] "This interpretation is controlling and should not be ignored unless plainly erroneous" (*Woods* v. *Macken*, No. 5941 (C. A. 4), decided December 19, 1949, citing *Bowles* v. *Seminole Rock and Sand Company*, 325 U. S. 410, 414; *Bowles* v. *Mannie & Co.*, 155 F. 2d 129, 133 (C. A. 7); *Porter* v. *Crawford & Doherty*, 154 F. 2d 431 (C. A. 9), certiorari denied 329 U. S. 720. As this Court said in the latter case "since such administrative construction is not irrational its interpretations are binding upon the courts") (p. 433).

cation of the administrative action. In *Bowles* v. *Wheeler,* 152 F. 2d 34, certiorari denied 66 S. Ct. 265, this Court stated:

> The reenactment of the Act after such administrative construction was made known to Congress constitutes a legislative ratification of that interpretation.

See also *Woods* v. *Oak Park Chateau Corp.,* No. 9821, decided January 4, 1950 (C. A. 7th); *Bowles* v. *Griffin,* 151 F. 2d 458 (C. A. 5); *Pinkus* v. *Porter,* 155 F. 2d 90, 93 (C. A. 7).

The Third Circuit Court of Appeals applied the same rule to the lack of Congressional change to an administrative regulation. This statement of the rule is four-square to the case at bar:

> Added sanction is given to the administrative interpretation by the reenactment of the statute without disapproval of the regulations thereunder (*Bazley* v. *Commissioner of Internal Revenue,* 155 F. 2d 237, 242 (C. A. 3).

In view of the foregoing appellant's contention that the reasonable requirements of the regulation are beyond the Office of the Housing Expediter is unfounded and specious.

II. There is no merit in defendant's third contention that the Court erred "in its finding that each of said leases contains provisions for permitting or providing for substantial decrease or reduction in services"

Defendant's third contention challenges the finding of the Court below that the leases which he attempted to file contained a provision for a decrease in services. The appellant argues that the Court below erred on

two grounds in finding the leases properly rejected because they provided for a reduction in services:

1. Because the leases contained a "positive statement thereon that the landlord agrees to maintain the same services as before" (Br. 21), and

2. Because the landlord did not in fact reduce the services (Br. 22).

These contentions are clearly without merit.

1. The nub of defendant's argument in this case is that an unlawful reduction in essential services as provided in the leases in question did not constitute an increase in rent so that when added to the 15% monetary increase therein provided, the total increase was not in excess of the increase lawfully provided by Section 204 (b) of the Act and Section 4 (b) of the regulation. There is no question, of course, but that the leases actually provided for a decrease in services and that the findings of the Court below (R. 14) were supported by substantial evidence. Such finding must be accepted by this Court. (Rule 52 (a), Federal Rules of Civil Procedure (28 U. S. C. A., following Section 723 (c); *Columbian Nat. Life Ins. Co.* v. *Quandt & Sons,* 154 F. 2d 1006 (C. A. 9); *Coffin-Reddington* v. *Porter,* 156 F. 2d 113 (C. A. 9th); *Martini* v. *Porter,* 157 F. 2d 35 (C. A. 9th), certiorari denied 67 S. Ct. 109).

The record clearly shows and the Court below found that the landlord did not include a statement in the leases as alleged by him in his brief that he would continue "to provide substantially the same services, furnishings and equipment as those included in the maximum rent in Item 4" (Br. 21).

Plaintiff's Exhibit No. 5 was a letter dated December 10, 1948 from appellant's attorney to Mr. Sidney Feinberg, Chief, Litigation Section of the Office of the Housing Expediter in San Francisco[6] (Tr. 110). In that letter to Mr. Feinberg which was "for your records" (Tr. 108) appellant's attorney stated:

> On July 25, 1947, our client, Mr. Jacob Cornet, filed with the San Francisco Rent Office leases providing for a 15% rental increase on all of the units mentioned in your complaint. Some months later, the said leases were returned to Mr. Cornet with a notice of rejection on the ground that the leases provided for a reduction of services. Upon receipt of the rejected leases, Mr. Cornet went to each tenant and added the following clause in both the landlord's and tenant's copy of said leases, "Lessor agrees to maintain same services as before signing of this lease."
>
> * * * * *

This document was carefully weighed by the Court below in arriving at his conclusion that the original leases had in fact been rejected from filing because of the provision for a decrease in services. The Court clearly indicated that the information contained in the letter must have been furnished by the defendant.

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[6] There was some attempt at the trial to disparage the role of David Wexler as attorney for defendant (Tr. 108–112); and that there was a misunderstanding between them (Tr. 115). However, the Record shows that David Wexler not only wrote the letter on information furnished by defendant on December 10, 1948 (Tr. 110), but also prepared and filed the answer on said information on January 31, 1949. The answer was filed presumably after Mr. Louis Wexler had returned to his office and reviewed it (Tr. 106).

> The COURT. Did you show him this letter?
>
> Mr. WEXLER. Yes, I did, a copy of it, and he denied that is the conversation that he stated to my brother, that there was a misunderstanding of what he was trying to say.
>
> The COURT. It follows he could not get that information from anyone else. Your brother could not get that, on the date of this letter.
>
> The WITNESS. Maybe he misunderstood me. That could happen.
>
> The COURT. I do not think he misunderstood you at all, for the record discloses clearly what is in this letter. They have been changed, and they were changed after the OPA rejected them. The reason I develop these facts, I do not want to interfere with the trial of any case, but if there is any doubt about it at all you can make any kind of a showing you see fit. Is that all from this witness? (Tr. 115–116).

The letter referred to was introduced on cross-examination of the defendant for the purpose of impeaching his testimony on this point. The Court below had the opportunity to observe the conduct of the defendant on the stand and to weigh his oral testimony against this documentary proof and decided to accept the document. The inferences drawn therefrom by the Court below, being supported by substantial evidence must be accepted by this Court.

> The trial court observed their conduct and demeanor while on the stand, and was in better position than we are to appraise the situation and to draw inferences. We are not able to

> say that the finding in question was clearly erroneous and are therefore obliged to accept it. *Columbian National Life Ins. Co.* v. *A. Quandt & Sons,* 9 Cir., 154 F. 2d 1006. (*Coffin-Reddington* v. *Porter,* 156 F. 2d 113, 114 (C. A. 9th).)

On the basis of the foregoing evidence and the authorities heretofore cited appellant clearly failed to establish that the Court below erred in finding that the leases did in fact provide for a reduction in service.

2. Defendant's contention that he did not in fact reduce the services is beside the point in determining whether he is entitled to the benefits of the Act. The Expediter filed suit for the collection of excess rents. The landlord contended that the rents were being collected pursuant to statutory authority. In the Court below the Expediter proved to the satisfaction of the Court that the leases supporting the rent increases were contrary to the express provisions of the Act and the regulation. Therefore, the point at issue was not whether the services had in fact been reduced. The question solely before the Court below was whether the leases were properly rejected as not conforming to the Act and the regulations.

This Court and other courts of appeal have held that where a statutory exemption or benefit is made available under certain conditions, the person claiming such benefit must strictly follow the requirements of the statute. In *Fontes* v. *Porter,* 156 F. 2d 956 (C. A. 9), the Price Administrator sued for over-

charges because the defendant had sold a rebuilt tool at the "rebuilt and guaranteed price" without providing a written guarantee required by the Regulation as a condition to charging such price. The seller pleaded *inter alia* that he orally guaranteed the tool and in pursuance of such guarantee had actually serviced it. In rejecting that defense this Court speaking through Judge Healy said at p. 958:

> Neither of these requirements was met by appellant. In the absence of compliance he was not entitled to take advantage of the price permitted for rebuilt and guaranteed tools. A holding otherwise would encourage equivocation and evasion.

Such was the conclusion of the Court of Appeals for the First Circuit in *Porter* v. *Nowak,* 157 F. 2d 824. In that case the seller had disposed of a motor vehicle at a guaranteed price without furnishing a written guarantee. He did, however, furnish an oral warranty in pursuance of which he serviced the car on two separate occasions. In holding that the dealer had in fact overcharged because of failure to furnish a written guarantee, the Court of Appeals said that there was good and sufficient ground for adhering to the statutory provisions and that failure to follow them rendered the seller liable for such failure.

The rule expressed by this Court in the *Fontes* case, *supra,* has been applied by the courts in construing Section 204 (b) of the Act of 1947, as amended. Failure to comply with the strict filing requirements of the statute was a fatal defect (*Woods* v. *Roberts,* No. 9024 (E. D. Pa.), decided 2/21/49, opinion set forth in full, *infra,* pp. 41–42).

> However, it is well settled that to effectuate a valid and legal increase in the maximum legal rent there must be compliance with the Administrative procedure as contained in the Act and a failure so to do is fatal in an action such as is presently before this Court (*infra,* p. 42).

The leases increased the rent and if in compliance with the Act decontrolled the property.[7] The literal provisions of both the Act and the regulations have been upheld by many other courts. The following cases have upheld this principle but have not published their opinions: *Woods* v. *Gossett,* No. 3259 (M. D. Pa.), decided 12/10/48; *Woods* v. *Davidson,* No. 862 (S. D. Tex.), decided 3/14/49; *Woods* v. *Hustad,* No. 375 (D. Mont.), decided 2/28/49; *Woods* v. *Wald Opticians* (E. D. Pa.), No. 4524, decided 10/18/48; *Woods* v. *Tiffany* (N. D. N. Y.).

As Judge Murphy said in the *Gossett* case, *supra:*

> The regulations are in accord with the Act itself and clearly and specifically enunciate the intent of Congress. See U. S. Code Congressional Service, 80th Congress, First Session 1947 at p. 1237 et seq., (Statement of the Managers on the Part of the House, House Report No. 591, June 13, 1947) particularly at p. 1240 discussing Section 204 (b) and stating clearly that the fifteen percent increase would be effective only if certain conditions were complied with, one of which was the requirement of filing in accordance with the requirements

[7] It must be borne in mind that the signing of a voluntary lease decontrolled the property permanently (Sec. 204 (b)). A rigid adherence to the letter of the Act was necessarily within Congressional intent. (See H. Rep. 591, 80th Cong. 1st Sess., p. 12.)

> spelled out in the Act. (The opinion in this case is set forth in full in the Appendix, *infra,* pp. 49–51.)

In the *Wald Opticians* case, *supra,* Judge Duffy (now Circuit Judge), stated among other findings of fact:

> 10. In none of these instances recited in Paragraph 8 have these leases entered into between the landlord and tenant been filed with the Housing Expediter as provided by the Housing and Rent Act of 1947, but were filed January 19, 1948.
>
> 11. The leases entered into between the landlord and the tenants are ineffective to increase the legal maximum rentals of the premises involved herein.

And in his conclusions of law he stated *inter alia* based upon the foregoing findings:

> 3. The leases entered into between the landlord and the tenants on September 1, 1947, are ineffective to increase the legal maximum rentals of the premises involved herein.

(The findings and conclusions of the case are set forth in full, *infra,* pp. 43–48.)

The appellant's failure to abide by the provisions of the Act, the regulation and the interpretation sustain the Expediter's rejection of the filing of the leases in question. On the authority of the foregoing opinions the Court below correctly held that the monetary rents collected by the appellant were in excess of the legally established maxima. Restitution was therefore the proper remedy to be applied by a court of equity. *Porter* v. *Warner Holding*

Company, 328 U. S. 395; *Woods* v. *Richman,* 174 F. 2d 614 (C. A. 9); *Woods* v. *Gochnour,* 177 F. 2d 964 (C. A. 9).

So here, the landlord's failure to adhere to the statute and regulations resulted in a rejection of his leases. His leases remained defective and no attempt was made by him to correct the defect or to appeal from such rejection. His failure to do one or both rendered him liable for the consequences of his illegal conduct and the Court below correctly so found.

III. The Court below correctly held that defendant failed to exhaust his administrative remedies

If this Court agrees with appellee's argument in Points I and II above, it is unnecessary to consider defendant's argument that the Court below was in error in holding that the defendant failed to exhaust his administrative remedies (R. 15). The finding is supported by the record in the following examination of the Area Rent Attorney:

> Mr. Donohue. Q. Mr. Goldberg, was there any right of administrative review to the Form D–27–A giving notice of the rejection of this lease?
>
> A. There was.
>
> Q. To whom did he have the right of appeal? State if you know.
>
> A. He had the right of appeal both to the Regional Housing Expediter and to the National Housing Expediter.
>
> Q. Could you state by virtue of what regulation?
>
> A. By virtue of the Rent Procedural regulation No. 1 issued September 4, 1947.

Q. Do the records of your office indicate that any such right was ever exercised in connection with these premises?

A. Our records indicate that they were not.

Defendant argues in his Point II that the Court below was in error in finding defendant had failed to exhaust his administrative remedies, for two reasons:

1. Exhaustion of administrative remedies was unnecessary because the regulation was invalid, and

2. That the Area Rent Director did not issue an order from which a appeal could be taken but merely issued a "Notice of Rejection." As shown above (pp. 9–17) in Point I, the regulation is inconsistent with the Act. There is, therefore, no reason to re-argue that contention.

Thus, the remaining contention for consideration is that defendant was relieved of the duty to exhaust his administrative remedies because no order was issued but "merely a Notice of Rejection." The short answer to this contention is contained in the transcript in the colloquy between the Court and counsel, where the Court aptly points out that the objection is one of form and not of substance and that it was sufficient compliance with the Act and the regulation that the defendant was given actual Notice of Rejection of the leases and reasons for such rejection.

The Court. If I followed you, you indicated there was no order set?

Mr. Wexler. There was no order set. It was a notice on a form D–27a, a notice of return of the rejected lease.

Mr. DONOHUE. Counsel has reference to form and not to substance. I think if the court will read that——

The COURT. The record discloses it complies with the law.

Mr. WEXLER. That, to my mind, is not a formal order.

The COURT. You mean the form of it?

Mr. WEXLER. Yes, it is not an order, in a form in which the rent director makes an order.

The COURT. As far as this court is concerned, that is a sufficient order for all purposes here, and if I am in error about that you may point it out.

Mr. WEXLER. My experience with orders is that orders have always stated on their face, "This is an order of the area rent director," and that the order takes effect on a certain date.

The COURT. Not necessarily. Notice is all that is necessary. However, you may proceed.

Sections 840.11 through 840.16 of Procedural Regulation No. 1 (12 F. R. 5916) [8] provide for the procedure in obtaining rent increases by filing leases. Section 840.13 provides that where the rent director determines that the leases failed to conform to the statutory requirements "he shall return the lease to the landlord together with an order notifying the landlord that the lease has been rejected." Within

[8] The validity of this regulation has been challenged by appellant (Br. 4). This regulation is merely procedural. Since he has challenged the substantial regulation (Sec. 4 (b)), the argument in support of the validity of Section 4 (b), *supra*, pp. 15–17, is basically applicable to the Procedural Regulation, therefore, it will not be reargued here.

thirty days of the receipt of such order, the landlord may ask for a review of such order "or appeal pursuant to Sections 824.23 or .25 and following." Sections 840.23 and .25 govern the review of a rent director's order by the Regional Housing Expediter. Upon failure to obtain relief from the Regional Housing Expediter, the landlord is permitted to appeal to the Housing Expediter.

Defendant for the first time raises the question of the fact that some of the leases were rejected prior to the issuance of the foregoing Procedural Regulation (Br. 20.) However, this belated defense to the failure to exhaust his administrative remedies is specious on the facts themselves and upon the proved conduct of the defendant. The provisions of the regulation (Section 840.14) permit a landlord to move within thirty days after rejection of his lease for a "reconsideration of such order" or "file an application for review." Since this regulation was issued on September 4, the leases which were rejected on August 8 and 9 could have been appealed or reconsidered pursuant to that section. Obviously the regulation was in effect for three of the leases since by defendant's own admission they were rejected on "September 8 or 9" (Br. 10).

In any event, defendant's true intent may be gathered from plaintiff's Exhibit No. 5, the letter written by Mr. David Wexler to Mr. Sidney Feinberg, *supra,* p. 3, in which Mr. Wexler states:

> Mr. Cornet had originally obtained these form leases from the Apartment House Owners Association. After the above service clause

> was added to said leases, our client called the said association and talked to Mr. Christin who informed Mr. Cornet that it was not necessary to refile the said leases. He told Mr. Cornet that as long as he originally filed the leases the O. P. A. had no right to return them and that Mr. Cornet had complied with the rent law by filing the same and there was nothing further that he had to do.

It would unnecessarily labor the point to enumerate the administrative procedure available to Mr. Cornet in view of his avowed intent and subsequent conduct as revealed by the foregoing statement.

The failure of the defendant to resort to administrative remedies provided by the Housing Expediter precluded defendant from claiming that the Area Rent Office was in error in rejecting his leases. As the Supreme Court held in *Yakus* v. *United States,* 321 U. S. 414, 435, a defendant must first exhaust his administrative remedies even in a criminal case where the defendant asserts the unconstitutionality of a regulation establishing maximum prices which he is charged with having violated. As stated by this Court in *La Verne Co-op. Citrus Ass'n.* v. *United States,* 143 F. 2d 415, at p. 419 (C. A. 9):

> A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. *Lockerty* v. *Phillips,* 319 U. S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339; *Myers* v. *Bethlehem Shipbuilding*

Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638; *United States* v. *Superior Court,* 19 Cal. 2d 189, 120 P. 2d 26.

See also, *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3d) where the challenge to a regulation was also made by way of defense.

Therefore, the defendant having failed to avail himself of his administrative remedies precludes his right to challenge the validity of the Notice of Rejection of his leases. "Courts before have refused to hear defendants on points susceptible of correction by administrative procedures." (*LaVerne Co-op. Citrus Ass'n.* v. *United States,* 143 F. 2d, at p. 420.)

CONCLUSION

It is respectfully submitted on the basis of the foregoing that the judgment of the Court below is correct and should be affirmed.

ED DUPREE,
General Counsel,
A. M. EDWARDS, JR.,
Acting Assistant General Counsel,
FRANCIS X. RILEY,
Special Litigation Attorney,
Office of the Housing Expediter,
Washington 25, D. C.

APPENDIX

Housing and Rent Act of 1947 (50 U. S. C. App. 1881 et seq.)

Sec. 204. (b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title: *And provided further,* That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section. In any

case in which a maximum rent for any housing accommodations is established pursuant to the provisions of the last proviso above, such maximum rent shall not thereafter be subject to modification by any regulation or order issued under the provisions of this title. No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above shall be subject after December 31, 1947, to any maximum rent established or maintained under the provisions of this title.

SEC. 204. (d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

SEC. 206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

CONTROLLED RENT REGULATION FOR HOUSING (12 F. R. 4331)

SECTION 1. *Definitions and scope of this regulation.*— * * * "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations.

SEC. 2. *Prohibition against higher than maximum rents*—(a) *General prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. A reduction in the minimum space, services, furniture, furnishings, or equipment required under section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received.

SEC. 3. *Minimum space, services, furniture, furnishings and equipment.*—Except as set forth in section 5 (b), every landlord shall, as a minimum, provided with housing accommodations the same living space as provided June 30, 1947, or on the date he first rented on or after July 1, 1947, and the same essential services, furniture, furnishings, and equipment as those he was required to provide on June 30, 1947, in accordance with the Rent regulation for housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, or those he provided on the date he first rented on or after July 1, 1947,

and as to other services, furniture, furnishings and equipment not substantially less than those he was required to provide on June 30, 1947, or actually provided on the date of first renting on or after July 1, 1947.

SEC. 4. *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947.*—The maximum rent for any housing accommodation under this regulation (unless and until changed by the Expediter as provided in section 5) shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section.

SEC. 4. (b) *Maximum rent established under a lease.*—In any case in which a tenant and landlord, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any controlled housing accommodations and such lease takes effect after July 1, 1947, and expires on or after December 31, 1948, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, the rent provided by the lease if it does not represent an increase of more than 15 percent over the maximum rent otherwise applicable. Such lease shall increase the maximum rent otherwise applicable for any housing accommodations only if a true copy thereof signed by both the landlord and tenant is filed with the area rent office for the Defense-Rental Area in which the accommodations are located within fifteen days after the date the lease is executed. Every landlord shall file with a true copy of such lease Form D–92—Registration of Lease—in triplicate. A maximum rent established under this paragraph shall not be subject to additional increase by execution of a subsequent lease. No maximum rent established

under this paragraph shall be subject to modification by any order of the Expediter.

A lease shall be effective under this paragraph to increase the maximum rent only if it provides with the housing accommodations the same living space and the same essential services, furniture, furnishings, and equipment as required by this regulation prior to the effective date of the lease, and as to other services, furniture, furnishings and equipment, not substantially less than required prior to the effective date of the lease. The landlord shall continue to provide such space and services, furniture, furnishings, and equipment at all times after the effective date of such lease.

RENT REGULATION FOR HOUSING (8 F. R. 7322)
SECTION 2 (a)

SEC. 2. *Prohibition against higher than maximum rents*—(a) *General prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the mixiumum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SEC. 3. *Minimum services, furniture, furnishings and equipment.*—Except as set forth in section 5 (b), every landlord shall, as a minimum, provide with housing accommodations the same essential services, furniture, furnishings, and equipment as those provided on the date determining the maximum rent, and as to other services, furniture, furnishings and

equipment not substantially less than those provided on such date: *Provided, however,* That where fuel oil is used to supply heat or hot water for housing accommodations, and the landlord provided heat or hot water on the date determining the maximum rent, the heat and hot water which the landlord is required to supply shall not be in excess of the amount which he can supply under any statute, regulation or order of the United States or any agency thereof which rations or limits the use of fuel oil.

SEC. 5 (a). *Decrease in minimum services, furniture, furnishings and equipment*—(1) *Decrease prior to effective date.*—If, services provided for housing accommodations are less than the minimum services required by section 3, the landlord shall either restore and maintain such minimum services or, within 30 days (or, for housing accommodations within the Los Angeles Defense-Rental Area, within 60 days) after such effective date, file a petition requesting approval of the decreased services. If, on such effective date (or on December 1, 1942, where the effective date of regulation is prior to that date), the furnishings or equipment provided with housing accommodations are less than the minimum required by section 3, the landlord shall, within 30 days after such date, file a written report showing the decrease in furniture, furnishings or equipment.

SEC. 13. *Definitions.*—(a) When used in this regulation the term: * * *

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for the use or occupancy of housing accommodations or for the transfer of a lease of such accommodations.

District Court of the United States
District of Massachusetts

FRANK R. CREEDON, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER

v.

ANNA O'BRIEN

C. A. No. 6782. May 16, 1947

WYZANSKI, J. This is an application for a temporary injunction made by Frank R. Creedon, Expediter, Office of the Housing Expediter. The application is made pursuant to the provisions of Section 205 (a) of the Emergency Price Control Act of 1942, as amended, 50 U. S. C., App. Sec. 925 (a). The provisions of the relevant regulation, that is to say, the rent regulation for transient hotels, residential hotels, rooming houses and motor courts, known as Regulation No. 1388, most recently amended November 1, 1946, include the following regulation in Section 6 (a):

> So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant of a room within a hotel, rooming house or motor court shall be removed from such room, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated unless * * *. [The exceptions, not being pertinent to this case, are not quoted.]

The defendant, Anna O'Brien, is a resident of Boston, Massachusetts. At all material times she has

been landlord of a rooming house at 95 Pinckney Street, Boston, Massachusetts, which is located in the Eastern Massachusetts Defense-Rental Area as that area is defined in the rent regulation to which reference has already been made and which is set forth in extenso in 8 F. R. 7334 and amendments subsequently published.

For over nine years Dr. Dickinson S. Miller has been an occupant of rooms at 95 Pinckney Street, Boston. He has continuously since and prior to March 1, 1942, occupied the first floor front room of the rooming house. He has also at various times occupied additional rooms.

In the summer of 1946, Miss O'Brien several times orally stated to Dr. Miller that he should move. In the fall of 1946 she gave him a written notice to move. Neither the oral notices nor the written notice were supported by any of the grounds recognized in Section 6 of the rent regulation as being valid grounds for the termination of a tenancy, with two possible exceptions. Miss O'Brien appears to have made complaint that Dr. Miller did not keep his rooms in the most orderly and tidy fashion that she could imagine and she also made complaint with respect to a particular mat in the public bathroom. Miss O'Brien has not appeared here to support either of those allegations, and from listening to Dr. Miller I am persuaded that his conduct upon the premises has not been such as to justify terminating his tenancy on the ground that he has violated the obligations of a tenant or that he has committed a nuisance. Being a man 78 years of age and being by profession a teacher of philosophy, a professor and lecturer in that field, it is not to be anticipated that he will keep his quarters looking as neat as a bandbox. The phrase "a quatre epingles" is not a common descrip-

tion of either septuagenarians or philosophers; and when Miss O'Brien rented the premises to Dr. Miller she undoubtedly knew that he was past middle age and engaged in professional pursuits which would distract him from housekeeping duties.

Miss O'Brien, having failed to induce Dr. Miller to leave by her oral requests and her written notice, has resorted to various aggravations. She has removed from his room a bed as well as certain other furniture which was there on March 1, 1942. To his embarrassment she has removed the window shade. She has cut off the electric power necessary for the proper lighting of the room which was there on March 1, 1942. She has, with the purpose of causing embarrassment to Dr. Miller and affording him less protection than he is entitled to, taken away from him the key to the room.

The record makes it abundantly clear that by contemptible indirection, Miss O'Brien has been attempting to remove or exclude from possession a tenant entitled to the protections afforded by the Emergency Price Control Act of 1942 and by the rent regulation for rooming houses.

Upon the basis of this finding, I conclude as a matter of law that the plaintiff, Frank R. Creedon, Expediter, Office of the Housing Expediter, is entitled to the temporary injunction for which he prays. That injunction shall be so drafted as to require the defendant, Miss Anna O'Brien and her successors as landlords and all those persons in active concert or participation with her who receive actual notice of this order by personal service or otherwise, to refrain from evicting or excluding Dr. Dickinson S. Miller from possession of the first floor front room of the rooming house at 95 Pinckney Street, Boston Massachusetts, so long as he complies with the obligations

specified in Section 6 of the rent regulation for rooming houses. The injunction shall also specifically direct Miss O'Brien to restore to the room all articles of furniture which were present in that room on March 1, 1942 (including the bed, the chairs, the lamps, the window shade, and like articles). The order shall direct the defendant O'Brien to restore to that room the degree of electric current and power and the number of electric light bulbs which were provided on March 1, 1942; and the order shall also provide that the defendant O'Brien shall restore to Dr. Dickinson S. Miller the key to the said room. The injunction shall also provide that the defendant O'Brien shall provide such bedclothes and such services in connection with cleaning the room and making the bed as were supplied on March 1, 1942.

NOTE.—I wish to add a note with respect to one point which has been raised by Dr. Miller. He states that recently the defendant O'Brien has placed outside his window mosquito netting which is not placed outside the window of any other tenant. It is his view that the defendant O'Brien placed that netting outside his window, to use his words, "In connection with the recent siege of the premises." He states also that during the period of conflict between him and the landlady, he used his window as a means for securing candles and food and the like through the window. Since it is my anticipation that the defendant O'Brien will obey the injunction in this case and that the hostilities which resulted in what was alleged to be a "siege" may be brought to an armistice if not to a peace, I do not feel that my injunction need go so far as to embrace the netting; but nothing that I have said is to be regarded as suggesting that the defendant O'Brien should continue to leave the netting at the window or that Dr. Miller should take

in his own hand the question of disposition of the netting. I have no doubt that the defendant O'Brien, after receiving the specific injunction which this Court proposes to issue, will not desire to come as near as maybe to violating it in order to find out whether she is in contempt.

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 9024

(Filed February 21, 1949)

TIGHE E. WOODS, HOUSING EXPEDITER OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

ISABEL E. ROBERTS, 35 EAST STEWART AVENUE, LANSDOWNE, PENNSYLVANIA, DEFENDANT

SUR MOTION FOR SUMMARY JUDGMENT

FEBRUARY 21, 1949.

WELSH, J. This is an action in which the Housing Expediter seeks a refund of overcharges to two tenants and an injunction restraining defendant from violating the Housing and Rent Act of 1947, 50 U. S. C. A. Appendix, Section 1881 et seq. After answer by the defendant the plaintiff filed a motion for summary judgment on the ground that the pleadings and admissions on file in the action show there is no genuine issue as to any material fact and no defense set forth in the answer is sufficient in law.

The record discloses that the maximum legal rent for the housing accommodations within the Philadelphia Defense-Rental Area designated as third-floor apartment, 35 East Stewart Avenue, Lansdowne, Pennsylvania, was $35.00 per month. The defendant-landlord received rent for the use and occupancy of

the aforesaid housing accommodations from the tenants, Mr. and Mrs. Eugene A. Martin, in the amount of $50.00 per month from August 1, 1947, to November 30, 1947, inclusive, and from the tenant, Gerald B. Ogle, Jr., in the amount of $50.00 per month from December 1, 1947, to May 31, 1948, inclusive. It is clear, therefore, that the defendant received rents in excess of the maximum legal rent established by the Act and Regulation issued pursuant thereto.

The contention is that the defendant should be excused because she acted in good faith in that she entered into an agreement with each of the tenants increasing the rent by 15%, and in addition, she partially furnished the housing accommodations in question at the times in question.

There can be no dispute that an increase in the maximum legal rent is authorized by the Act if agreed to by the parties or the accommodations are furnished in whole or in part. However, it is well settled that to effectuate a valid and legal increase in the maximum legal rent there must be compliance with the Administrative procedure as contained in the Act and a failure so to do is fatal in an action such as is presently before this Court.

We conclude, therefore, that there is no genuine issue as to any material fact and no defense set forth in answer is sufficient in law, and the motion for summary judgment is accordingly granted.

An order may be presented providing for payment in the amount of $60.00 to the tenants, Mr. and Mrs. Eugene A. Martin, and for the payment of $90.00 to the tenant, Gerald B. Ogle, Jr., and for an injunction restraining defendant from violating the Housing and Rent Act of 1947.

In the District Court of the United States for the Eastern District of Wisconsin

Civil Action No. 4524

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, FOR AND ON BEHALF OF THE UNITED STATES, PLAINTIFF

vs.

WALD OPTICIANS, INCORPORATED, A WISCONSIN CORPORATION, AND ALEX WALD, INDIVIDUALLY, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above entitled matter came on for trial before the Honorable F. Ryan Duffy, one of the Judges of this Court, in the Federal Courts Building, Milwaukee, Wisconsin, on the 14th day of October 1948, at 9:30 a. m. Eugene T. Devitt appeared as attorney for the plaintiff, and the defendants were represented by David Beanor. In open Court, the attorneys for the plaintiff and the defendant stipulated that the defendants increase the rentals 15% over the legal maximum rent, on 8 units at 2224 West Fond du Lac Avenue, Milwaukee, Wisconsin, on July 1, 1947, without the execution of written leases. It was further stipulated that on September 1, 1947, the defendants executed written leases with the 8 tenants involved herein, increasing the rents 15% over the legal maximum rentals. It was further stipulated that duly executed copies of these leases were not filed with Office of the Housing Expediter within 15 days after their execution as provided by the Housing Rent Act of 1947, as amended. Further it was stipulated and agreed that duly executed copies of these leases were filed with the Office of the Housing Expediter on January 19, 1948. Upon the stipulation thus entered into

in open Court and upon plaintiff's Complaint, Amended Complaint and Request for Admissions, and upon defendant's Answer to Request for Admissions Answer, and upon all the files and records herein, and the Court having heard the arguments of counsel for plaintiff and for defendants and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Order for Judgment.

FINDINGS OF FACT

1. Tighe E. Woods is the duly appointed and qualified Housing Expediter, Office of the Housing Expediter.

2. The Court has jurisdiction, by reasons of Section 206 (b) of the Housing and Rent Act of 1947, as amended, hereinafter referred to as the "Act".

3. At all times mentioned herein, and on and after July 1, 1947, there was continuously in full force and effect issued pursuant to Section 204 of the Act, the Controlled Housing Rent Regulation (12 F. R. 4331), hereinafter called the "Controlled Regulation," establishing maximum rents for the use and occupancy of controlled housing accommodations within the Defense-Rental Area of Milwaukee, Wisconsin, which includes the premises herein located at 2224 West Fond du Lac Avenue, Milwaukee, Wisconsin. Section 4 of the Controlled Regulation establishes the maximum rent for any housing accommodations thereunder to be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and of the applicable rent regulations issued thereunder.

4. On June 30, 1947, and during the prior time or periods mentioned herein, there was continuosuly in full force and effect, pursuant to Section 2 (b) of the Emergency Price Control Act of 1942, as amended,

the Rent Regulation for Housing (8 F. R. 7322), hereinafter called the "Rent Regulation", establishing maximum rents for the use and occupancy of housing accommodations within the Defense-Rental Area of Milwaukee, Wisconsin, in which the premises herein involved were located and which were owned by the defendants.

5. The maximum rentals, prescribed by the Rent Regulation set forth in the preceding paragraph hereof, for eight of the dwelling units in the premises involved herein, were as follows:

Unit:	*Maximum rent*
1	$42.50 per month
3	42.50 per month
4	42.50 per month
5	42.50 per month
10	42.50 per month
12	42.50 per month
13	42.50 per month
14	45.00 per month

6. The aforesaid establishment contains numerous rooms, apartments, or housing accommodation units included in which are dwelling units or housing accommodation units which constitute controlled housing accommodation units within the meaning of the Act and the Regulation. At all times material herein, said controlled rooms, apartments, or housing accommodation units have been and are now let and rented out to various tenants for dwelling units and the defendants have been collecting and receiving rents from the tenants for the use and occupancy of all the said controlled rooms, apartments, or housing accommodation units in said establishment.

7. The defendants have engaged, and are about to engage, in acts and practices which constituted or will

constitute violations of Section 206 (a) of the Act and of other provisions of law applicable in the premises.

8. The defendants, in violation of the said Regulation, and Section 206 (a) of said Act, and Section 4 of the said Price Control Act, did, beginning with on or about July 1, 1947, demand, receive and have been collecting as rent herein, from the tenants of the premises, for the use or occupancy thereof, amounts in excess of the maximum legal rents established therefor, by said Acts and Regulations. In all instances the defendants and all of the tenants included herein entered into leases on or about September 1, 1947, which leases increased the rental rates 15% over the established maximum rents. In all instances, defendants increased rentals for all of the tenants two months prior to the execution of the leases.

9. Section 204 (b) of the Housing and Rent Act of 1947 provides as follows:

> * * * *Provided, further,* That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily entered into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed within 15 days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section * * *.

10. In none of the instances recited in Paragraph 8 have these leases entered into between the landlord and tenant been filed with the Housing Expediter as provided by the Housing and Rent Act of 1947, but were filed January 19, 1948.

11. The leases entered into between the landlord and the tenant are ineffective to increase the legal maximum rentals of the premises involved herein.

12. The Court finds that the sums listed below were collected from the tenants listed and constitute rentals in excess of the legal maximum rentals. The overcharges were collected from July 1, 1947, through January 19, 1948. The Court further finds that the other four tenants involved herein have signed releases with the defendants and are not entitled to a refund. The Court further finds that the four tenants involved herein are not entitled to refunds from the defendants on and after January 20, 1948, the date on which said leases were filed with the Office of the Housing Expediter.

Unit	Tenant	Overcharges
1	Arnold Kohne	$44.66
10	Celia Dobratz	44.66
12	William Engelfried	44.66
14	W. J. Parkins	47.25

13. That the enforcement of the Housing and Rent Act of 1947, as amended, and the justice and equity of the situation requires the defendants to make restitution of all amounts listed above collected and accepted by them from the tenants in excess of the maximum legal rentals therefor.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the subject matter of this action and the parties hereto.

2. That the defendants since on or about July 1, 1947, have been violating the provisions of the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended, by demanding, accepting or receiving rent for the housing accommodations in excess of the rental permitted by the Acts and Regulations.

3. The leases entered into between the landlord and the tenants on September 1, 1947, are ineffective to increase the legal maximum rentals of the premises involved herein.

4. That unless restrained by this Court, the defendants will continue to demand, accept and receive rent for said housing accommodations in excess of the maximum legal rentals established therefor.

ORDER FOR JUDGMENT

It is hereby ordered that judgment be entered:

1. Enjoining and restraining the defendants and those acting for the defendants from soliciting, demanding, accepting or receiving any rent in excess of the maximum rent prescribed by the Controlled Housing Rent Regulation, as amended, or in excess of the maximum rent permitted by any other regulation or order adopted pursuant to the Housing and Rent Act of 1947, as amended.

2. Ordering and commanding the defendants to make restitution to the tenants of the amounts listed in the Findings of Fact.

Dated at Milwaukee, Wisconsin, this 18th day of October 1948.

Enter:

DUFFY,
United States District Judge.

United States District Court for the Middle District of Pennsylvania

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

JOSEPH GOSSETT, 620 SOUTH 23RD STREET, HARRISBURG, PENNYLVANIA

No. 3259, Civil Action

MEMORANDUM

The Housing and Rent Act of 1947, 50 U. S. C. A. App. Sections 1881–1902, effective June 30, 1947, provided in Section 204 (b), 50 U. S. C. A. App. Section 1894 (b), inter alia, "* * * That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section * * *"

On June 30, 1947, pursuant to the authority granted to the Housing Expediter in Section 204 (d) of the Act, Controlled Housing Rent Regulation was issued (12 F. R. 4331) effective July 1, 1947. Section 4 (b) of said regulation provided inter alia that "such lease shall increase the maximum rent otherwise applicable for any

housing accommodations only if a true copy thereof signed by both the landlord and tenant is filed with the area rent office for the Defense-Rental Area in which the accommodations are located within fifteen days after the date the lease is executed. Every landlord shall file with a true copy of such lease Form D–92—Registration of lease—in triplicate * * *''

On July 23, 1947, the general counsel of the Housing Expediter issued an interpretative bulletin (12 F. R. 5040) as to the aforesaid Section 4 (b) of the regulations. This bulletin provided inter alia, ''In order that a lease may be effective under Section 204 (b) of the Act and Section 4 (b) of the rent regulations to increase the maximum rent otherwise allowable by an amount not to exceed fifteen percent, all of the following requirements must be met: * * * (7) The landlord must file with the area rent office a true and duly executed copy of the lease, or a true and duly executed copy of a lease extension agreement to which is attached a copy of the lease being extended (certified to be a true copy) within fifteen days after the date of execution of the lease or extension agreement.'' And further in Part IV of said bulletin under the heading ''Filing Requirements''—''Under the Act and the regulations, a lease shall not be effective to increase the maximum rent unless a true and duly executed copy of the lease is filed within fifteen days after the date of its execution * * *'' And in Part V. ''A'' lease is ineffective to increase the maximum legal rent if it increases the maximum legal rent which was in effect immediately prior to the effective date of the lease by more than fifteen percent.''

The regulations are in accord with the Act itself and clearly and specifically enunciate the intent of Congress. See U. S. Code Congressional Service, 80th Congress, First Session 1947 at p. 1237 et seq, (Statement of the Managers on the Part of the House, House Report No.

591, June 13, 1947) particularly at p. 1240 discussing Section 204 (b) and stating clearly that the fifteen percent increase would be effective only if certain conditions were complied with, one of which was the requirement of filing in accordance with the requirements spelled out in the Act.

The defendant landlord entered into lease agreements with three of his tenants increasing the maximum rent 25 percent, 15 percent, and 13 percent, respectively. At no time did the landlord make any attempt whatever to comply with the filing requirements. He seeks to defend such failure by pleading ignorance of the provisions of the Act, the Regulations and the Bulletin. In fact, no attempt had been made by the landlord to comply with the registration requirements in effect prior to the 1947 Act.

Defendant, relying upon *Porter, Price Administrator* v. *Warner Holding Co.,* 1946, 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332, asks this Court in the exercise of its discretion to deny the prayer of the Housing Expediter that defendant be ordered to make restitution of the rents thus illegally collected. To grant defendant's requests would be to ignore the clear and definite intent of the Act and the Regulations. See "Some Reflections on the Reading of Statutes", Vol. 47, Col. L. Rev., May 1947, p. 527 et seq, article by Mr. Justice Frankfurter, particularly at pp. 528, 533, 534, 536.

> We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it. Cardozo, J. in *Anderson* v. *Wilson,* 1933, 289 U. S. 20, 27, 53 S. Ct. 417, 77 L. Ed. 1004.

We must bear in mind the language of the Supreme Court in *The Hecht Co.* v. *Bowles,* 321 U. S. 321 at 330, 64 S. Ct. 587, 88 L. Ed. 754, "We do not mean to imply

that courts should administer Section 205 (a) grudgingly." And again at 331, "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under Section 205 (a) must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injuctive relief in these cases. That discretion should reflect an acute awareness of the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' * * * and that delay or indifference may be fatal."

See also *Shadid* v. *Fleming,* 10 Cir., 160 F. 2d 752, 753; *Porter* v. *Block,* 4 Cir., 156 F. 2d 264, 268, holding that a provision similar to that here under consideration should be liberally construed in order to carry out the purpose of Congress to control prices and to prevent destructive inflation.

On the subject of the lack of knowledge of the landlord that he was violating the laws and the regulations, see *Gilbert* v. *Thierry,* D. C. Mass., 58 F. Supp. 235, 242, affirmed 1 Cir., 147 F. 2d 603, 604; *Creedon* v. *Evangelisti,* D. C. E. D. Pa. 77 F. Supp. 538 at 540; *West* v. *Winston,* D. C. E. D. Pa., 8 F. R. D. 311 See also *Brown* v. *Hecht Co.,* App. D. C. 137 F. 2d 689 at 691.

> An order or restitution is not a judgment for damages or for penalties. It compels compliance and is restoration of the status quo which falls within the recognized power of a court of equity. *Bowles* v. *Skaggs,* 6 Cir., 151 F. 2d 817, 821.
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> * * * an order of restitution may be granted with or without a prohibitory injuction. *Creedon* v. *Randolph,* 5 Cir., 165 F. 2d 918 at 920.

Similarly judgment may be granted where restitution is the only relief allowed. *Woods* v. *Wallace,* D. C. E. D. Pa. 8 F. R. D. 140.

While no opinions were written two district courts have also taken the position that failure to comply with the filing requirements of the Act and the Regulations make the lease ineffective and deny the 15 percent increase. In the case of *Woods* v. *Robenco, Inc.,* Civil Action No. 1944, decided June 25, 1948, W. D. Wis., Stone J. (unreported opinion) the leases were not filed at any time; in the case of *Woods* v. *Wald Opticians, Inc. et al.,* Civil Action No. 4524, decided October 18, 1948, E. D. Wis., Duffy J. (unreported opinion) the leases were filed after the fifteen days for filing had expired.

On the question of exercise of discretion, see message of President Truman in connection with the signing of the Housing and Rent Act of 1947 in U. S. Congressional Service, *supra,* at p. 1867.

The problem before the court in *Porter, Price Administrator* v. *Warner Holding Co.,* 328 U. S. 395, *supra,* was the question whether or not the district court had the power to order restitution. Upon remand in the *Warner* case, the lower court's order compelling restitution was approved by the Eighth Circuit, 166 F. 2d 119, the court using the language at 121, "We see nothing unconscionable in an order which requires the defendant to restore to those from whom they were received gains exacted in violation of law."

Since the landlord is no longer in possession of the premises, the request for injunction will be denied; the prayer for summary judgment will be granted.

JOHN W. MURPHY,
United States District Judge.

DECEMBER 10, 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1950